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No. .....

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In The
Supreme Court of the United States
October Term 1986

WESTMAN COMMISSION COMPANY,
Petitioner,

v.

HOBART INTERNATIONAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether, under § 1 of the Sherman Act, a conspiracy between a manufacturer and a dealer, which may be *per se* unlawful in some circuits, can be considered purely vertical and thus *per se* lawful in the Tenth Circuit.

B. Whether a concerted refusal to deal between a manufacturer and a powerful dealer, which decreased both intrabrand and interbrand competition, was *per se* lawful merely because the conspiracy involved no direct price-fixing or tying arrangement.

C. Whether the Court of Appeals, in assessing the impact of a restraint on competition at the dealer level, properly included all products of manufacturers in the relevant product market, rather than the package of products in the industry-recognized "one-stop shopping" market from which Plaintiff was excluded.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Westman Commission Company petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on June 25, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals from which this Petition is taken is reported at 796 F.2d 1216. A copy of the Opinion below is reprinted in the Appendix ("App.").

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JURISDICTION

The Court of Appeals filed its Opinion on June 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations is declared to be illegal . . . .

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STATEMENT OF THE CASE

In 1973, Westman Commission Company ("Westman") purchased a restaurant equipment and supply business. Westman intended to expand the scope of its business to that of a "full-line distribution" or a "one-stop shopping" center to supply commercial food service customers with all of their kitchen equipment and supplies. One-stop shopping afforded customers convenience, cost

savings and better service than distributors specializing in selected products and thus had become a recognized and distinct market.

Hobart International, Inc. ("Hobart") is a manufacturer of commercial kitchen equipment. Hobart does not use exclusive distributors or territorial restraints. As of 1976, the Denver area had eight Hobart dealers. Further, at the time Westman purchased the restaurant equipment company, Hobart had been accepting orders from that company for several years as if it were a Hobart dealer, without requiring a formal dealership agreement. Indeed, before the sale to Westman, Hobart had indicated that it would have "no problem" in granting a dealership to Westman. Following the purchase by Westman, Hobart continued to accept orders from Westman on a casual basis over the following 14 months because it "needed the business."

Prior to 1973, Nobel Incorporated ("Nobel") was the only one-stop shopping operation in the Denver area, and as such it enjoyed a distinct competitive advantage. Thus, although there were from five to eight other Hobart dealers in the Denver area between 1973 and 1977, Nobel shipped almost 50% of the total dollar volume of Hobart sales in the Denver area. Nobel did not consider any of the other dealers to be direct competitors, and therefore made no objection when Hobart appointed two new dealers in 1973 and 1974. It was only when Westman acquired a limited outlet and merged it into a full-line distribution center that Nobel objected. Within a few days after Westman outbid Nobel on a Denver Public School job, which included Hobart equipment, the manager of Nobel's con-

tract design department warned Hobart's district manager that permitting such competition to continue would jeopardize the relationship between Nobel and Hobart. Within a month, Hobart internal memoranda showed that Westman had been targeted for rejection by Hobart because it was "competing directly with Nobel Incorporated."

The trial court specifically found that Hobart had no legitimate business or efficiency reason for refusing to deal with Westman, characterizing the Hobart reasons given, including its "dealer loyalty" justification as "pretextual". Hobart itself needed the sales, and even suggested that Westman should boot-leg Hobart equipment through other dealers. However, in January of 1976, Hobart advised Westman that it was not going to deal with Westman on any basis.

The Trial Court found that Hobart and Nobel conspired to keep Westman from becoming a successful one-stop shopping concern. Because many Hobart kitchen products were perceived by customers as without acceptable substitutes, a Hobart distributorship was indispensable to an entrant into the "one-stop shopping" market. The refusal of a Hobart dealership, as well as the discontinuance of sales on a casual basis, prevented Westman from offering Nobel any significant price competition on bids or negotiated sales. As a result, Westman was forced to close its full-line contract department and abandon the restaurant design and installation business. Thus, Westman was completely excluded from the one-stop shopping market. As the Trial Court found, "given the prevalent market requirement for Hobart equipment, Westman was not only precluded from competition for Hobart sales, but

for other equipment as well. Thus, other manufacturers and dealers and purchasers were adversely affected by this conspiracy to restrain trade.'"[1]

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION IN CLEAR CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Court of Appeals held that no "vertical" restraint could be *per se* illegal in the absence of any price-fixing. The Tenth Circuit also held that in no event could a combination or conspiracy between a manufacturer and a dealer be considered anything other than a purely vertical restraint of trade.[2]

In so deciding, the Tenth Circuit aligned itself with the decisions of the Seventh Circuit[3] and with a recent decision of the Fifth Circuit Court of Appeals.[4] These decisions conflict with decisions of the Third and Sixth Circuits.

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[1] *Westman Commission Co. v. Hobart Corp.*, 461 F.Supp. 627, 636 (D. Colo. 1978) ("Westman I").

[2] App. at 12a.

[3] *Products Liability Insurance Agency, Inc. v. Crum & Forester Insurance Companies*, 682 F.2d 660 (7th Cir. 1982).

[4] *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212 (5th Cir. 1986).

The Third Circuit[5] and the Sixth Circuit[6] have clearly rejected the analysis of the Tenth Circuit which is based only on the formal characterization of a restraint as "vertical" or "horizontal," in favor of a more sensitive determination on the facts of each case of whether the principal impact of a vertical agreement is felt on the horizontal level.[7] These courts have held that the restraint becomes primarily horizontal in nature if the action of the manufacturer is taken at the direction of one of its customers. Thus, they hold that vertical agreements to exclude competition may in some instances require application of the *per se* rule in the absence of price-fixing allegations.

The Tenth Circuit decision may also conflict with decisions by courts in the Ninth Circuit[8] and by courts in the Eighth Circuit.[9] A plaintiff such as Westman would ap-

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[5] *Malley-Duff & Associates v. Crown Life Insurance Company*, 734 F.2d 133 (3rd Cir.), *cert. denied*, 105 S. Ct. 564 (1984).

[6] *Com-Tel, Inc. v. Dukane Corp.*, 669 F.2d 404 (6th Cir. 1982).

[7] *Malley-Duff & Associates v. Crown Life Insurance Company*, 734 F.2d at 141: " . . . The *Products Liability* characterization of such an agreement as a vertical restraint . . . does not foreclose inquiry as to whether defendant's alleged agreement may have constituted a *per se* violation where its principal impact was felt on the horizontal level."

[8] *A.H. Cox & Company v. Star Machinery Company*, 653 F.2d 1302, 1305, n. 3 (9th Cir. 1981): "Thus, a *per se* violation might be established if a manufacturer's decision to terminate a dealer was prompted by dealer coercion, either by a single dealer or by a group of dealers."

[9] *Copperstone v. Griswold Sporting Goods Co.*, 1977-2 Trade Cases 61,623 (E.D. Mich. 1977) (Held: evidence showing that a manufacturer yielded to pressure by a single good customer and agreed to refuse to deal with the plaintiff competitior of the single customer [is] illegal); and see, *Quality Mercury Inc.*

(Continued on following page)

parently receive different treatment in other circuits when it proved that a nominally vertical agreement had the purpose and effect of restraining competition on a horizontal level.[10]

The conflict between the Circuits is also evident on the issue of group boycotts. The Tenth Circuit held that "for a group boycott to exist, there must be an agreement among conspirators whose market positions are horizontal to each other."[11] The court expressly rejected the view of the Sixth Circuit "that an agreement between a single manufacturer and a single distributor can constitute a *per se* illegal group boycott."[12] The Sixth Circuit holds the view that "numerosity on the same horizontal level as the boycotted party is not required."[13] And yet, both the Tenth

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(Continued from previous page)

v. Ford Motor Company, 542 F.2d 466, 471, n. 5 (8th Cir. 1976): " . . . Here the alleged combination was between one horizontal competitor and a franchisor. But we do not consider these differences critical. While the presence of a horizontal conspiracy would render the restraint a *per se* violation of Section 1, the absence of a horizontal conspiracy does not automatically render the restraint reasonable."

[10] *See Ron Tonkin Gran Turismo v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1385 (9th Cir. 1981), *cert. denied*, 454 U.S. 831, 102 S.Ct. 128 (1981): "It seems, therefore, that a characterization of a restraint as vertical or horizontal is not necessarily determinative of the analysis—either *per se* or rule of reason—to be applied. In fact, it has been noted that "a number of decisions involving concerted refusals to deal have turned upon the relationship between the boycotting parties, that is, whether the agreement could be characterized as at least partially horizontal or as solely vertical. This decision has only limited utility. When considered apart from the purpose and effect of the agreement, it can lead to undesirable results." [citation omitted.]

[11] App. at 14a, n. 1.

[12] *Id.*

[13] *Com-Tel Inc. v. Dukane Corp.*, 669 F.2d at 414.

and Sixth Circuits hold that a group boycott warrants application of the *per se* rule of illegality. Thus, the definition of a group boycott becomes all important to any uniform application of the *per se* rule.

The controversy over dealer terminations and over refusals to deal with potential dealers continues to result in numerous civil actions and in extensive analysis by the commentators. This Court's two-year-old decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) has been cited by both the Tenth Circuit Court of Appeals[14] and the Third Circuit Court of Appeals [15] for their diametrically opposite views of the proper analysis to be applied.

This Court, in the landmark decision of *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977), stated that it did not "foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibitions. . . ." The Court remained open to such a possibility because, as it said, "The view that the manufacturer's interest necessarily corresponds with that of the public is not universally shared." *Id.* at 56. Thus, the time is ripe for a determination by this Court that would relieve the confusion among the circuit courts of appeals. A clarification by this court would reduce substantial risks and uncertainty for manufacturers and dealers alike.

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[14] App. at 15a.

[15] *Malley-Duff & Associates v. Crown Life Insurance Company*, 734 F.2d at 141.

II. THE TENTH CIRCUIT HAS ESTABLISHED A RULE OF PER SE LEGALITY.

By creating irrebuttable presumptions, the Court of Appeals frustrated the plaintiff's attempts to show the *real* economic consequences of the defendant's conduct. More important, if perpetuated by other courts, these presumptions would establish a new *per se* rule of legality for non-price vertical restraints.

A. The Characterization Of Hobart's Refusal To Deal As A Purely Vertical Restraint Was The Product Of Barren Formalism.

The court below fell victim to "formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977). In rejecting the argument that the *per se* rule should apply to Hobart's conduct in this case, the Tenth Circuit concluded that its refusal to deal was purely vertical, because only one manufacturer and only one dealer were involved.[16] The easy label precluded any careful analysis.[17] The Tenth Circuit refused to consider how the purpose and impact of this refusal rendered it more like a horizontal restraint than a manufacturer's independent decision. It ignored the source and the target of the restraint, and allowed a group of powerful businessmen to act in concert to deprive Westman of the goods it needed to compete effectively. *Cf. Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 210 (1959).

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[16] "For a group boycott to exist, there must be an agreement among conspirators whose market positions are horizontal to each other." App. at 15a, n. 1.

[17] *Cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979) ("But easy labels do not always supply ready answers.")

Professor Posner, the principal authority cited in support of the decision below[18] would extend a rule of *per se* legality only to "*purely* vertical restrictions."[19] Posner expressly acknowledges the distinction set forth in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3rd Cir. 1979): ". . . If the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier."

The Tenth Circuit overlooked this distinction, which has been widely recognized by other scholars and commentators.[20] Indeed, the Tenth Circuit appears to have overlooked this Court's decision in *Klor's Inc. v. Broadway-Hale Stores Inc.*, 359 U.S. 207 (1959). which is an example of a boycott allegedly perpetrated by a single firm at the blockaded level.

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[18] R. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981).

[19] *Id.* at 8. (Emphasis added.)

[20] *See* P. Areeda, Antitrust Law VII, ¶ 1453 at 144 (1986): "A restraint can be vertical in form without being the product of the manufacturer's free choice. He may adopt it in order to retain a particular dealer or group of dealers who demand such restraints on their competitors as a condition of continuing to deal with the manufacturer." *See*, L. Sullivan, *Handbook of the Law of Antitrust*, 231, n. 1 (1977): "But it is conceivable that only a single firm at the blockaded level may succeed in coercing or inducing suppliers or customers (or, for that matter, one important supplier or customer) from dealing with one or more would-be competitors of the perpetrator. Such an arrangement would display all essential elements of a boycott." And *see*, Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Columbia Law Review, 689, 713 (1979): " . . . There should be no difference between a combination of competitors and a combination of a supplier and a customer. Both involve two or more persons. The key inquiries instead should be the purpose or intent of the defendants and the effect of the restraint on competition."

The Tenth Circuit also refused to consider the horizontal impact of the restraint in this case—that Westman was excluded from particular jobs and from effective competition in general with Nobel. Effectively cut off from Hobart products, Westman was unable to compete for full-line contract work including restaurant design and installation contracts. Thus, Westman was unable to offer a substantial group of customers competitive bids for Hobart products or for *any other manufacturer's* products. This exclusion benefitted Nobel and deprived consumers of a competitive alternative. The Tenth Circuit disregarded these facts. Instead, the Court of Appeals wrongly assumed that a "vertical" restraint is necessarily unilateral or *independent*;[21] and that a vertical restraint is necessarily ancillary to some legitimate objective of the manufacturer.[22]

B. The Tenth Circuit Wrongly Presumed That The Manufacturer Was Acting In The Public Interest When It Refused To Deal With Westman.

The Tenth Circuit asserted, as an *a priori* truth, that "the only real incentive a manufacturer has to restrict distribution of its product is to make its product more competitive."[23] Thus, the Tenth Circuit rejects the possibility that a manufacturer's conspiracy with a single dominant dealer may have the same anti-competitive im-

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[21] *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1469 (1984).

[22] *See, Addyston Pipe & Steel Co. v. United States*, 85 Fed. 271, 276 (6th Cir. 1898), aff'd 175 U.S. 211 (1899); Bork, *The Antitrust Paradox* at 26-30 (1978).

[23] App. at 21a.

pact as a conspiracy with a dealer cartel. However, this ignored possibility runs directly counter to this Court's precedent: Manufacturers have in fact been induced to violate § 1 of the Sherman Act for the benefit of a single powerful competitor at the level of the complaining party.[24] When such a horizontal competitor asserts its influence over a manufacturer to cause the exclusion of a new competitor, the court should not hesitate to find an illegal restraint of trade.[25] The trier of fact in future cases should be free to ferret out the situation in which a vertical restraint is only a vehicle for predatory market exclusion.[26]

In this case, the trier of fact found specifically that Hobart needed and wanted the increased sales that Westman could offer, but that Hobart denied itself this opportunity in order to placate Nobel, its dominant dealer in the Denver area.[27] The Tenth Circuit ignored this evidence and the trial court's finding in favor of its unfounded presumption.

C. The Tenth Circuit's Assumption Of Pro-Competitive Reasons For Hobart's Refusal To Deal Was Entirely Conjectural.

The Tenth Circuit invoked this Court's decision in *Continental T.V. Inc. v. GTE Sylvania Inc.*, and listed

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[24] *Klor's Inc. v. Broadway-Hale Stores Inc., supra.*

[25] *See,* W. Stewart, B. Roberts, *Viability of the Antitrust Per Se Illegality Rule: Schwinn Down - How Many To Go?* 58 Wash. U. Law Quarterly, 727, 761 (1980).

[26] *See,* L. White, *Vertical Restraints in Antitrust Law: a Coherent Model,* The Antitrust Bulletin, 327, 329 (Summer 1981).

[27] *See, e.g.,* 461 F. Supp. at 631: Hobart dealt with Westman "on a casual basis" because it "needed the business."

the four pro-competitive reasons a manufacturer *may have* to limit the number of outlets that distribute its products.[28] Strangely, the Tenth Circuit insisted that these reasons were "readily apparent" even though they were not supported by any fact in evidence at trial, and though most of the reasons were rejected by the trial court as inapplicable in this case.

First, the Court of Appeals asserted that limiting the number of distributors could produce economies of scale. However, there was no evidence whatsoever that the exclusion of Westman from the Denver market had any such effect on Nobel or on any of the several other Hobart dealers. The record showed only that Nobel was one of five to eight Hobart dealers in the Denver area.[29] Any inference that Hobart intended to limit the number of distributors was impossible, given the evidence that Hobart signed new distributors *after* refusing to deal with Westman.[30]

Second, the Tenth Circuit suggested that limitations on the number of distributors "may encourage distributors to make the investment necessary to carry a new manufacturer's product."[31] Far from being a "new manufacturer," the record below showed that Hobart was "the Cadillac of the food service industry," and enjoyed the reputation of being "the preeminent manufacturer of kitchen equipment."[32]

Third, the Tenth Circuit surmised that limiting the number of outlets might encourage distributors to provide

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28 App. at 22a.

29 *Westman I*, 461 F. Supp. at 629.

30 See Joint Book of Exhibits ("JBE") 1 at 78.

31 App. at 22a.

32 461 F. Supp. at 628.

more dealer services, including product services.[33] This explanation is inapplicable in the present case for at least two reasons:

(a) Hobart provides factory service of its own equipment,[34] and thus has no interest in encouraging its dealers to do so; and

(b) Hobart has never pursued a policy of market division in the Denver area—whether by way of exclusive dealerships, location clauses or even profit pass-over clauses—which strongly suggests that this manufacturer is not seeking, by its agreement not to deal with Westman, to encourage dealer services or to avoid a free rider problem.[35] Again, if there were any free riders, some of them were put into position by Hobart even after Westman was excluded.[36]

Fourth, the Tenth Circuit assumed that limiting the number of distributors could reduce the manufacturer's "transaction costs." The premise that the avoidance of duplicative and inefficient services necessarily justifies vertical restrictions has been shown to be either invalid or simply devoid of support in economic theory.[37] Every suc-

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[33] App. at 22a.

[34] 461 F. Supp. at 628.

[35] "Without implementation of market division, or resale price maintenance, advocates of this theory maintain that market imperfections will prevent distributors from providing these economically-efficient point of sale services." W. Stewart, B. Roberts, *Viability of The Antitrust Per Se Illegality Rule: Schwinn Down, How Many To Go?*, 58 Wash. U. Law Quarterly 727, 751 (1980). Thus, Hobart's refusal to deal with Westman cannot be explained as an attempt to correct market imperfections. Hobart simply never took the appropriate steps—instead, it collaborated in a targeted exclusion of one competitor.

[36] See JBE I at 78.

[37] *See*, W. Stewart, B. Roberts, op. cit., *supra*, at 752.

cessful monopolist reduces transaction costs. Further, the record in this case refuted any such rationale. Hobart accepted orders from Westman on a casual basis for as long as it could because it "needed the business"[38] and never suggested that the benefit of these additional sales to Westman was outweighed by any increase in transactional costs.

The Tenth Circuit exceeded the bounds of proper appellate review. A proper application of the Rule of Reason would have shown that Hobart's refusal to deal was a naked restraint—the product of agreements eliminating competition which have no net efficiency-creating tendency.[39]

D. The Tenth Circuit's Deference To The Virtue Of Dealer Loyalty Insulates Predatory Market Exclusion From Antitrust Scrutiny.

The Tenth Circuit asserted that a manufacturer has an absolute right to "ensure dealer loyalty."[40] The Court of Appeals stated that it would never consider the threat of the loss of an existing distributor's loyalty any differently from a manufacturer's attempt to acquire such loyalty by granting an exclusive distributorship.[41] Thus, the Court of Appeals flatly refuses to consider that the threatened withdrawal of dealer loyalty can be the means by which a dealer implements a naked restraint of trade.

Distributor loyalty may be nothing more than a decision of the distributor either to refuse to promote new

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38 461 F. Supp. at 632.

39 *See, R. Bork, The Antitrust Paradox* at 263-79 (1978).

40 App. at 25a-26a.

41 App. at 26a.

product lines or to promote a particular manufacturer's line in spite of competitive pressures.[42] Under certain circumstances, this form of loyalty obviously can have anti-competitive consequences. To continue to sell a manufacturer's products, even when they are not the best competitive alternative, may have the effect of foreclosing a newcomer or a new product from entering the market.[43]

In this case, the trial court specifically found that Nobel's loyalty was not the basis for Hobart's refusal to deal. At the time Hobart made the decision not to deal with Westman, its principal representative stated that he "had no loyalty from any dealer."[44] Indeed, the trial judge specifically discredited an assertion by Hobart that one reason for rejecting Westman as a dealer was Westman's asserted lack of loyalty.[45] Moreover, there was evidence that Westman was punished for attempting to give consumers more choices and lower prices.[46]

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[42] *See,* K. Strasser, *Vertical Territorial Restraints After Sylvania: A Policy Analysis and Proposed New Rule,* 1977 Duke Law Journal 775, 813 (1977).

[43] *Id.* at 814.

[44] *Westman I,* 461 F. Supp. at 631.

[45] 461 F. Supp. at 635. The trial court was surely cognizant of the evidence that showed that Westman sold more Hobart products during its 3 month trial period than many of Hobart's "loyal" dealers. See JBE I at 78.

[46] 461 F. Supp. at 633.

E. The Tenth Circuit's Holding Immunizes Anti-Competitive Restrictions Of Output.

The Tenth Circuit held that Section 1 of the Sherman Act does not prohibit vertical refusals to deal absent a showing of market power on the part of the *manufacturer*, so long as the manufacturer's motivation does not involve illegal pricing or tying arrangements.[47] The holding is an open invitation to predatory *dealers* to exploit their market power. Under the Tenth Circuit's rule, a dominant dealer such as Nobel can induce a manufacturer to restrain competition by means which do not serve the manufacturer's own self-interest.

"Retailers who agree to a horizontal restraint that the manufacturer does not desire are almost certainly attempting to restrict output for the sake of monopoly gains."[48] Thus, a dealer with market power has every incentive to promote intrabrand restraints in order to avoid the erosion of profits from intrabrand competition.[49] Vertical restraints induced by dealer pressure should be scrutinized.[50]

The real issue—ignored by the Tenth Circuit—remains whether the loss of intrabrand competition itself injures or

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47 Opinion below at p. 27.

48 R. Bork, *The Antitrust Paradox*, at 289 (1978).

49 *See, e.g., Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2nd Cir. 1980).

50 "Thus, dealer-generated restraints on intrabrand competition are likely to be more anti-competitive than distribution restraints freely adopted by a manufacturer to serve his own interests." P. Areeda, Antitrust Law VII, ¶ 1453 at 144 (1986).

benefits consumers.[51] "Those consumers are injured by the restraint if, without obtaining more services, they are denied intrabrand choices that are sources of consumer welfare . . . ."[52] In this case, the pressure from Nobel induced Hobart to give up sales to Westman which Hobart admittedly *needed*.[53] The Tenth Circuit's emphasis only upon the manufacturer's market power and the dealer's loyalty may permit such conduct to go unnoticed and unpunished.

III. THE COURT OF APPEALS IMPROPERLY DEFINED A PRODUCT MARKET UNRELATED TO THE COMPETITIVE EFFECT OF THE CONCERTED REFUSAL TO DEAL.

The District Court defined the relevant product market as "full-line" or "one-stop shopping" distributors of restaurant equipment and supplies in greater Denver.[54] The trial court focused on the market from which Westman was excluded. By contrast, the Court of Appeals focused only on the market in which *Hobart* competed, without considering the market in which the effect of its refusal to deal was felt. As the Justice Department's Guidelines for Vertical Restraints[55] recognize, such restraints "may be used by one or more competitors to ex-

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[51] " . . . rather than attempting to distinguish between good and bad restrictions on distribution by whether they are vertical or horizontal, courts should inquire whether the manufacturer's output increased or decreased as a result of the restriction . . ." R. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution*, 48 U. Chi. L. Rev. 6, 25 (1981).

[52] P. Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Autitrust Analysis*, 1981 Duke Law Journal, 417 (1981).

[53] 461 F. Supp. at 632.

[54] The District Court also found metropolitan Denver to be the relevant geographic market, 461 F. Supp. at 629. The Court of Appeals accepted this conclusion. Appellate Opinion at 11.

[55] U.S. Department of Justice, Vertical Restraints Guidelines, January 23, 1985 (hereinafter, the "Guidelines").

clude their rivals.''[56] Thus, the threshold question is: Excluded from what market?

Determining the relevant market requires a sensitive examination of degrees of insularity and the *effectiveness* of product substitutes.[57] The proper question for review is whether Hobart products are sufficiently interchangeable with other products so that Westman could find a substitute to carry it into the one-stop shopping market. The trial court found this was not possible, and the Court of Appeals never directly addressed the issue. The degree to which interbrand competition puts a ''check on the exploitation of intrabrand market power''[58] is precisely the issue which the Court of Appeals needed to address, but which it failed to perceive. The Tenth Circuit's preoccupation with assessing Hobart's competitive position in selling its products to limited-line distributors ignores the legal context of this case—Westman was excluded from the one-stop shopping market when the indispensable Hobart line was cut off.[59] In this context, Hobart clearly had market power, as found by the trial court.

The test for the existence of a distinct product market has been described by this Court as follows:

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[56] *Id.*, p. 16.

[57] E. Chamberlin, *The Theory of Monopolistic Competition*, at 65-68.

[58] *Continental T.V. Inc. v. G.T.E. Sylvania Inc.*, 433 U.S. 36, 52 n. 19 (1977).

[59] "One cannot determine the degree of market power that merits concern, or, consequently, the 'proper' market definition, without reference to the legal context in which the issue arises. One must consider what is under attack, the substantive rules of liability that govern the particular case, and the relief that is at issue." P. Areeda, Antitrust Law II, ¶ 518 at 348 (1978).

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.
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> *Brown Shoe Company v. United States,* 370 U.S. 294, 325, 82 S. Ct. 1502 (1962).[60]

The Court of Appeals mishandled *Brown Shoe's* mandatory submarket inquiry in several ways. First, as detailed above, most of the fact-specific analysis centers on whether substitutes exist for Hobart's equipment, rather than Nobel's distributional service, thus scrutinizing the wrong product in the wrong market.

The Tenth Circuit overlooked the fact that a product market can consist of a cluster of products or services where the total package is "significantly different from and appeals to buyers on a different basis from, the individual products considered separately." *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.,* 698 F.2d 1011, 1016-17

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[60] Consistent with this pragmatic, fact-specific approach, the Supreme Court has detected submarkets in a variety of contexts. *See International Boxing Club of New York v. United States,* 358 U.S. 242, 79 S. Ct. 245 (1959) (promotion of championship boxing contests, rather than all boxing, is relevant market for purposes of Sections 1 and 2 of the Sherman Act); *United States v. Paramount Pictures,* 344 U.S. 131, 68 S. Ct. 915 (1948) ("first run movies" is a submarket under Sections 1 and 2); *Fashion Originators' Guild v. Federal Trade Com'n,* 312 U.S. 457, 61 S. Ct. 703 (1941) ("original design dresses" is a submarket for purposes of Section 1).

(9th Cir. 1983), *cert. denied,* 464 U.S. 829, 104 S. Ct. 106 (1983) (affirming a finding that a full line of beauty products at the wholesale level was a separate product market). In this case, a one-stop shopping outlet could substantially outsell all other Hobart dealers because consumers preferred to shop in that format. Thus, the cluster of products makes the market. *See also, United States v. Phillipsburg National Bank & Trust Co.,* 399 U.S. 350, 360 (1970) and *United States v. Philadelphia National Bank,* 374 U.S. 3321, 356 (1963) (under Section 7 of the Clayton Act, full service banking rather than separate banking services was the relevant market because of customer preference and convenience).

Second, in examining the market position of Nobel as the only one-stop distributor in Denver, the Court of Appeals confines itself solely to unsubstantiated observations to the effect that "the fact that a distributor is able to satisfy all of a customer's needs at one location does not mean that it is free from competition from other types of distributors."[61] To constitute a submarket, Nobel's operation need not be "free" of competition (*i.e.,* enjoy an inelastic or virtually inelastic cross-elasticity of demand with respect to other methods of distribution), any more than championship boxing matches, to qualify as a submarket as in *International Boxing, supra,* need be free of competition from non-championship boxing.

The Tenth Circuit reasoned that Nobel could not occupy a submarket because "Westman continued to make equipment sales" after Hobart conspired with Nobel to

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[61] App. at 7a.

keep Westman out of full-line distribution.[62] If Westman and Nobel competed at all after the refusal to deal, it was in a different market—one in which Westman could not "compete directly with Nobel" for the full-line customer. Nor is it critical that some customers might shop in both formats. "The law does not require an exclusive class of customers for each relevant submarket." *Photovest Corporation v. Fotomat Corporation*, 606 F.2d 704, 714 (7th Cir. 1979).

Westman presented a wealth of evidence at trial to support the proposition that one-stop distributors enjoyed economies of scale, and other competitive advantages, which allowed them to compete on a different basis than other types of distributors.[63] This testimony included that of Thomas W. Wilscam, a Denver restaurant-owner and consumer of distributional services, and Harvey Turnebeaugh, a Nobel sales executive familiar with the Denver market. Indeed, Westman's costly decision to acquire Wilscam/WE-4 makes little sense unless after surveying the restaurant equipment and supply situation in Denver, it believed that acquisition would permit entry into a new market as a one-stop distributor.

Another bench-mark of the existence of a submarket is "industry or public recognition of the submarket as a separate economic entity." *Brown Shoe, supra,* at 325. *See, also JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1017 (9th Cir. 1983); *Weeks Dredging & Contracting, Inc. v. American Dredging Co.*, 451 F. Supp. 468, 487-8 (E.D. Penn. 1978). The Court of Appeals paid

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[62] App. at 7a.

[63] *See* Armstrong, JA I, 39-40, 41-42, 51, 80; Weil, JA I, 213-215; JA III, 785-789. *See* Wilscam, JA I, 190-191; Turnebeaugh, JA I, 180-181.

lip-service to this test, while ignoring the facts. A December, 1974 issue of *Institutional Distributor* magazine (a food service industry trade journal) introduced into evidence states that "[m]any of the 'Top 50' [institutional distributors ranked by annual sales volume] have been among the leaders of the swing toward full-line product capability in institutional distribution."[64] The magazine goes on to describe "the move toward full-line product capability" as one "of the major trends characteristic of institutional distribution in the past decade."[65] Nobel, the twelfth largest institutional distributor in the United States in 1973-4, is said by the trade journal to be "as committed as any distributor in the business to the one-stop shopping concept." *Id.* at 359.

Far from being clear error, the relevant market determination of the District Court was, and is, the only plausible finding.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion of the Tenth Circuit.

Respectfully submitted,

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September 1986

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[64] JBE II at 354.

[65] *Id.* at 355.

In the United States Court of Appeals
THE TENTH CIRCUIT

—o—

Nos. 83-1678
and 83-1801

—o—

WESTMAN COMMISSION COMPANY,

Plaintiff-Appellee
Cross-Appellant,

v.

HOBART INTERNATIONAL, INC.,

Defendant-Appellant
Cross-Appellee.

—o—

FILED
United States Court of Appeals
Tenth Circuit
June 25, 1986
ROBERT L. HOECKER
Clerk

—o—

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
(D.C. Civil Action No. 76-K-918)

—o—

George F. Karch, Jr. of Thompson, Hine & Flory, Cleveland, Ohio (Thomas J. Collin of Thompson, Hine & Flory, Cleveland, Ohio; James E. Hautzinger and Robert E. Youle of Sherman & Howard, Denver, Colorado, with him on the briefs), for Defendant-Appellant.

Kenneth L. Starr of Holmes & Starr, Denver, Colorado (Sidney W. DeLong of Holmes & Starr, Denver, Colorado, and Michael J. Abramovitz of Drexler, Wald & Abramovitz, Denver, Colorado, with him on the briefs), for Plaintiff-Appellee.

Before McKAY and SETH, Circuit Judges, and RUSSELL, District Judge.*

McKAY, Circuit Judge.

This is an antitrust case based on the refusal of a manufacturer to grant a distributorship. The defendant, Hobart International Corporation, manufactures one of approximately fifty-three separate lines of kitchen equipment sold by both the plaintiff, Westman Commission Company, and Nobel, Inc., another kitchen equipment distributor in the Denver area. The trial court described Hobart's products as the "Cadillac" of the food service

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*Honorable David L. Russell, United States District Judge for the Western District of Oklahoma, sitting by designation.

industry. *Westman Commission Co. v. Hobart Corp.*, 461 F. Supp. 627, 628 (D. Colo. 1978) ("Westman I"). Its products are of such high quality and so reasonably priced that an expert in food facilities design testified at trial that "there is a noticeable absence of acceptable substitutes at a price comparable with that of Hobart products." *Id.*

In 1978, Hobart sold commercial kitchen equipment through its food service dealer division to approximately 540 independent distributors located throughout the country. Hobart distributors were a part of a group of approximately 1500 to 1600 restaurant equipment distributors in the United States. Hobart distributors were able to purchase Hobart products at factory prices and were eligible for factory rebates of up to eight percent of their Hobart business at the end of the year. In January 1976, Hobart had eight distributors in the highly competitive, Denver-area market. The most successful of those distributors was Nobel, which accounted for forty to fifty percent of the dollar volume of Hobart sales in the Denver-area market between 1973 and 1977. In addition to selling Hobart products, Nobel sold many other lines of kitchen equipment and all other commodities necessary to supply customers in the institutional food service or restaurant business.

From 1952 to 1973, Westman was in the wholesale grocery business—supplying frozen foods, dry groceries, paper products, and janitorial supplies to retail grocers, restaurants, hospitals, schools, and other buyers. In 1973 Westman entered the restaurant equipment supply busi-

ness by purchasing the assets of the WE-4 Division of Wilscam Enterprises, Inc. At the time Westman purchased its WE-4 Division, Wilscam had an informal arrangement with Hobart to distribute Hobart products. For approximately fourteen months after Westman acquired the WE-4 Division, Hobart continued to make sales to Westman on a casual basis, but failed to offer Westman a formal distributorship agreement. Finally, in July 1974, Hobart informed Westman that it did not intend to offer Westman a distributorship. In January 1976, Hobart reaffirmed that it would not make Westman a Hobart distributor and informed Westman that it would no longer sell to Westman on a casual basis.

Thereafter, Westman brought this private antitrust action against Hobart alleging a violation of section one of the Sherman Act, 15 U.S.C. § 1 (1982). Westman claimed that Hobart had conspired with Nobel to prevent Westman from competing with Nobel in the Denver-area restaurant equipment supply market. There was no allegation that anyone other than Nobel and Hobart participated in the alleged conspiracy, that the alleged conspiracy had as its objective any tying arrangement, or that it was entered into to fix or stabilize prices. The sole factual basis for this action, as the trial court found on an adequate record, was that Nobel, fearing competition from Westman, urged Hobart to deny Westman a distributorship. The record shows that Nobel indicated to Hobart that, if Hobart granted Westman a distributorship, it would "jeopardize" Hobart's business relationship with Nobel. 461 F. Supp. at 635. Although Hobart offered other reasons for its refusal to grant Westman a distributorship, the trial court

dismissed those reasons as "pretextual." 461 F. Supp. at 636. Thus, it is clear from the record that Hobart, responding to Nobel's veiled threat, denied Westman a distributorship. The trial court determined that Hobart's refusal to deal constituted a per se violation of section one of the Sherman Act. It further concluded that, even under a rule-of-reason analysis, Hobart's refusal to deal would not withstand antitrust scrutiny. 461 F. Supp. at 636.

I.

As we approach this case, we must bear in mind that the purpose of the antitrust laws is the promotion of consumer welfare. Indeed, the Supreme Court has called the Sherman Act a "'consumer welfare prescription.'" *NCAA v. Board of Regents of University of Oklahoma*, 104 S.Ct. 2948, 2964 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). The Court has also explained that "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n. 21 (1977). We adhere to the view that the antitrust laws should not restrict the autonomy of independent businessmen when their activities have no adverse impact on the price, quality, and quantity of goods and services offered to the consumer. *See id.* Thus, we consider Hobart's refusal to deal in light of its effect on consumers, not on competitors. This approach is particularly important in cases involving vertical relationships, since such relationships often foster procompetitive business agreements. Accordingly, if the antitrust laws applicable to vertical dealings are uncertain or inefficient, they are

likely to have a chilling effect on beneficial, procompetitive market interaction.

II.

The trial court's decision in this case proceeds from its definition of the relevant market as "one-stop shopping." This term refers to a method of marketing in which a distributor carries multiple lines of the same product as well as lines of complimentary products, so as to provide all the needs of a food service operation. The trial court explained:

> There is a recognized distinct market wherein a purveyor can supply a customer in the institutional food service or restaurant business with all requisite equipment and supplies. Commonly referred to as "one-stop shopping" or "full-line distribution," customers obtain convenience, cost savings and better service from a "one-stop shopping" distributor than from houses specializing in selected products.

461 F. Supp. at 628. Having defined the relevant market as "one-stop shopping," the trial court determined that Hobart's refusal to grant Westman a distributorship excluded Westman from the market and therefore constituted a per se violation of the Sherman Act. We recognize that market definition is a question of fact, *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 915 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), and we thus review the district court's definition of relevant market under the "clearly erroneous" standard *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570, 579 (10th Cir. 1985).

The trial court concluded that Westman was excluded from the market even though it also found the market for Hobart products was highly competitive. 461 F. Supp. at 634. Moreover, the trial court found that Westman continued to make equipment sales after Hobart refused to grant it a distributorship. *Westman Commission Co. v. Hobart Corp.*, 541 F. Supp. 307, 315 (D. Colo. 1982) ("Westman II"). Indeed, Westman concedes in its brief that it "competes with Nobel in the sale of a broad spectrum of kitchen equipment and supplies," though it argues that this does not show effective competition in the "one-stop shopping" market. Appellee's Brief at 9.

In defining the relevant market as "one-stop shopping," the trial court apparently focused on the system of product distribution rather than the market facing the consumer of restaurant equipment. The trial court's focus justified the conclusion that "one-stop distribution" is an effective way to compete in the market. But the fact that "one-stop distribution" is an effective or even superior way to compete does not mean that the relevant market is limited to those who use that method of competition. "Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 592 (S.D.N.Y. 1958); *see also El Cid. Ltd. v. New Jersey Zinc Co.*, 551 F. Supp. 626, 633 (S.D.N.Y. 1982). The fact that a distributor is able to satisfy all of a customer's needs at one location does not mean that it is free from competition from other types of distributors.

Defining the relevant market first requires a determination of the product market. This inquiry necessi-

tates an examination of which commodities are "reasonably interchangeable by consumers for the same purposes." *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956). It is clear from both the findings of the trial court and the concessions of Westman in its brief that there is vigorous competition for the restaurant equipment supply dollar in the Denver area. Although Hobart is considered the preeminent manufacturer of kitchen equipment, there is no evidence that the restaurant equipment produced by other manufacturers is not reasonably interchangeable with Hobart products. Admittedly, an expert witness testified at trial that "in certain lines of restaurant equipment there is a noticeable absence of acceptable substitutes at a price comparable with that of Hobart products." 461 F. Supp. at 628. However, this witness did not testify that there was an absence of equivalent brands available in the market, only that there was an "absence of acceptable substitutes *at a price comparable* with that of Hobart products. *Id.* (emphasis added). Furthermore, we find nothing in the record to suggest that the cross-elasticity of demand between Hobart products and other competing products was inelastic. Indeed, because other manufacturers were competing with Hobart in the same market, the cross-elasticity of demand between Hobart products and other products was likely to be extremely elastic. In other words, raising the price of Hobart products likely would lead many customers to purchase competing brands. Thus, the record does not support the conclusion that the product market is confined to "one-stop shopping" distributors offering a package of goods. Accordingly, as a matter of law, we hold that the relevant product market at a minimum con-

sisted of the products generally sold by restaurant equipment dealers, whether or not those dealers carried a wide enough range of products and brands to be classed as "one-stop shopping" distributors. The trial court's finding that the product market consisted of less than this was clearly erroneous. *See Telex Corp. v. International Business Machines Corp.*, 510 F.2d at 919 (holding that, in light of evidence of cross-elasticity and interchangeable quality of products, the trial court's restricted definition of product market was plain error).

On appeal, Westman seeks to support the trial court's definition of the relevant market by citing authorities that suggest that sellers who provide a full line of products or services create a separate product market consisting of the "cluster or package" of goods or services. *See JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1016-17 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983); *United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 360 (1970); *United States v. Philadelphia National Bank*, 374 U.S. 321, 356 (1963). In these cases, the "cluster or package" of goods or services was the object of consumer demand. In *JBL Enterprises*, the Ninth Circuit said: "This cluster approach is appropriate where the product package is significantly different from, and appeals to buyers on a different basis from, the individual products considered separately." 698 F.2d at 1016-17. Because the "cluster or package" of goods is not the object of consumer demand in the restaurant equipment supply industry, Westman's reliance on these cases is misplaced.

In *JBL Enterprises,* the court found that the "cluster approach" was appropriate because the hair care and cosmetics industry "generally considers it necessary to carry a full line" and that "advertising and promotion often group the products." 698 F.2d at 1017. Here, in contrast, the record shows that competition in the restaurant-equipment supply industry generally does not occur at the full-line-of-services level. Until Westman entered the scene, Nobel was the only kitchen equipment distributor in the Denver area that used the "one-stop shopping" marketing strategy. 461 F.Supp. at 629 n. 1. Also, nothing in the record suggests that an established "one-stop shopping" pattern exists in markets outside the Denver area. Thus, *JBL Enterprises* does not support the trial court's definition of the relevant market.

Phillipsburg National Bank & Trust Co. and *Philadelphia National Bank* are likewise inapposite. In those cases, the Supreme Court found the full-service, commercial banking industry to be a distinct market because it provided a package of products and services that "are so distinctive that they are entirely free of effective competition from products or services of other financial institutions." *Philadelphia National Bank,* 374 U.S. at 356; *see also Phillipsburg National Bank & Trust Co.,* 399 U.S. at 360. In the instant case, the trial court recognized that Nobel, the only "one-stop shopping" distributor in the Denver area, faces direct competition from "non-one-stop shopping" distributors. *See Westman II,* 541 F. Supp. at 315 (Westman continued to make equipment sales after being denied a Hobart distributorship); *Westman I,* 461 F. Supp. at 634 (indicating the restaurant equipment supply industry is highly competitive); *see also* Appellee's

Brief at 9. Thus, for purposes of defining the relevant product market, the restaurant equipment supply industry is distinguishable from the commercial banking industry.

Defining the relevant market also requires a determination of the geographic market. The geographic market is " 'the narrowest market which is wide enough so that products from adjacent areas . . . cannot compete on substantial parity with those included in the market.' " *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351, 356 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 1285 (1984) (quoting L. Sullivan, *Handbook of the Law of Antitrust* § 12, at 41 (1977)). In other words,

> the outer boundary of the relevant product market is reached, if one were to raise the price of the product or limit its volume of production, while demand held constant, and supply from other sources beyond the boundary could not be expected to enter promptly enough and in large enough quantities to restore the old price or volume.

Id. Thus, in defining the geographic market, the trier of fact should have considered all distributors who compete to supply equipment to Denver-area restaurants. The record indicates that distributors from Wyoming, Montana, New Mexico, and Utah competed with Westman and Nobel in the Denver area. J.App. vol. I, at 172-74. Indeed, on some jobs, distributors as far away as California, Pennsylvania, and Texas vied to supply the equipment. *Id.* at 174. Thus, a trier of fact might have reasonably concluded that the relevant geographic market included restaurant equipment distributors from a multistate re-

gion that bid on Denver-area contracts. But for purposes of this appeal, it is sufficient for us to hold that, from this record, it was unreasonable as a matter of law for the court to conclude that the relevant geographic market included any less than the restaurant equipment suppliers located in the Denver metropolitan area.

III.

After determining that Westman was excluded from the market, the trial court concluded that Hobart had committed a per se violation of the Sherman Act. We recognize that the applicability of the per se test in vertical restraint cases is in a state of evolution. After weighing the conflicting authorities, we choose to align ourselves with the Seventh Circuit. We agree that, "in the absence of any evidence of intent to raise prices . . . an agreement whereby a supplier of some good or service refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal per se." *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.*, 682 F.2d 660, 663 (7th Cir. 1982); *see also Hennessy Industries, Inc. v. FMC Corp.*, 779 F.2d 402, 404 (7th Cir. 1985). Recently, the Fifth Circuit joined the Seventh Circuit's view in an extensive and well-reasoned opinion. *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212 (5th Cir. 1986). In that case, the court held that "in order for a manufacturer's termination of a distributor to be illegal *per se*, it must be pursuant to a price maintenance agreement with another distributor." *Id.* at 1218. The Ninth Circuit has expressed a similar view:

> Restraints solicited by a distributor but implemented by a manufacturer are not automatically per se violations. *A. H. Cox* [*& Co. v. Star Machinery Co.*], 653 F.2d [1302,] 1306 [(9th Cir. 1981)]. Restraints of this type come within the per se rule only if they "clearly had, or [were] likely to have, a pernicious effect on competition and lacked any redeeming virtue." *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors,* 637 F.2d 1376, 1386-87 (9th Cir.), *cert. denied,* 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 109 (1981).

General Business Systems v. North American Phillips Corp., 699 F.2d 965, 978 (9th Cir. 1983). *See also Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133-34 (2d Cir. 1978) (en banc), *cert. denied*, 439 U.S. 946 (1979); *Ace Beer Distributors v. Kohn, Inc.*, 318 F.2d 283, 286-87 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420-21 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

Other circuits have rejected this view, holding that a manufacturer who refuses to deal with a distributor commits a per se antitrust violation if the refusal is made at the behest of a competing distributor. These cases reflect the view that, even though the manufacturer's refusal to deal is a vertical restraint, it becomes "primarily horizontal in nature" because of the participation of the distributor who seeks "to suppress its competition by utilizing the power of a common supplier." *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979). A review of the cases that have followed *Cernuto*, however, reveals that in most of those cases, price-fixing motives formed the basis for the manufacturer's refusal to deal. For example, even though the *Cernuto* court

found the manufacturer's refusal to deal to be per se illegal, it stated that, upon remand, "if defendants can demonstrate that their actions were not motivated solely by considerations of price then the use of a *per se* rule might be inappropriate." *Cernuto*, 595 F.2d at 170. *See also Zidell Explorations, Inc. v. Conval International, Ltd.*, 719 F.2d 1465, 1470 (9th Cir. 1983) (terminating a *price-cutting* distributor at the request of a competitor held to be a per se violation); *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 469 (8th Cir. 1985) (finding a per se violation by a manufacturer who terminated a *discounting* distributor); *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1015 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983) (distinguishing *Cernuto* because it involved *pricing* motivations); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 245 (6th Cir. 1982) (distinguishing *Cernuto* because it involved the termination of a *price-cutting* distributor); *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.*, 682 F.2d 660, 663 (7th Cir. 1982) (would follow *Cernuto* if case had involved price fixing); *but see Tunis Brothers Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482, 1497-1501 (3d Cir. 1985) (applying *Cernuto* rationale to manufacturer's refusal to deal in the absence of price-fixing allegations), *vacated and remanded*, 54 U.S.L.W. 3662 (Apr. 8, 1986).[1]

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[1] The Third Circuit has also applied the *Cernuto* analysis in the absence of price-fixing allegations in *Malley-Duff & Assoc. v. Crown Life Ins. Co.*, 734 F.2d 133, 139-42 (3d Cir.), *cert. denied*, 105 S.Ct. 564 (1984). *Malley-Duff* is distinguishable from the instant case, however, because it involved a group boycott. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959),

(Continued on following page)

The Supreme Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, *reh'g denied*, 104 S.Ct. 2378 (1984), confirms the correctness of our rejection of a per se analysis in this case. In *Monsanto*, the Court held that a plaintiff could not survive a directed verdict by merely establishing that a manufacturer terminated a price-cutting distributor in response to complaints of a competing distributor. *Id.* at 759. The Fifth Circuit explained in *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212 (5th Cir. 1986):

> Nothing in *Monsanto* suggests that liability can be found without any evidence of a price fixing agreement. Rather the language of *Monsanto* can only indicate the Court's belief that *a price fixing agreement is a requirement for per se liability* in distributor-termination cases. For example, the Court indicated

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(Continued from previous page)

is distinguishable for the same reason. For a group boycott to exist, there must be an agreement among conspirators whose market positions are horizontal to each other. There is no evidence in the record of any horizontal combination; Hobart was the only manufacturer that refused to deal with Westman. *See Terry's Floor Fashions v. Burlington Industries*, 763 F.2d 604, 610 n. 10 (4th Cir. 1985). We reject the view of the Sixth Circuit that an agreement between a single manufacturer and a single distributor can constitute a per se illegal group boycott. *See Com-Tel, Inc. v. Dukane Corp.*, 669 F.2d 404 (6th Cir. 1982).

In addition, we are aware of the Supreme Court's decision in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), but find that case distinguishable. In *Topco*, the Court held that a cooperative association for supermarkets violated the Sherman Act when it gave association members a "veto of sorts" over the admission of new members. *Id.* at 602. In the instant case, Nobel had no such "veto power" over Hobart's distributorship decisions. Hobart's refusal to deal with Westman was a vertical restraint, as opposed to a "horizontal restriction among ostensible competitors," as was the case in *Topco*. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 57 n. 27.

> that a plaintiff must show that the "distributors are not making independent pricing decisions." *Monsanto, supra*, 465 U.S. at 762, 104 S.Ct. at 1470. The Court also stated that "it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages." *Id.* Finally, the Court defined the concept of "common scheme" as including communication between the parties as to an agreement on price. *Id.* at 764 n. 9, 104 S.Ct. at 1471 n. 9.

Business Electronics Corp., 780 F.2d 1218 (emphasis added).[2]

Since the record reveals not the slightest hint of price maintenance or price fixing, Hobart's refusal to deal cannot be illegal per se. Of course, if there were allegations of retail price maintenance, price fixing, or tying arrangements, our analysis would be quite different. *See Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1469 & n. 7 (1984) (retail price maintenance); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1476-77 (10th Cir.), *cert. denied*, 106 S.Ct. 77 (1985) (retail price maintenance); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 387-88 (10th Cir. 1985) (price fixing); *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 438 (10th Cir.), *cert. denied*, 104 S.Ct. 197 (1983) (price

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[2] In a case containing no allegations of price fixing, *Blankenship v. Herzfeld*, 661 F.2d 840, 844-45 (10th Cir. 1981), we quoted from *Cernuto*, but found that it did not mandate finding an antitrust violation because the defendant-manufacturer had acted independently when it terminated its distributor. We emphasize that, in light of the view expressed in *Monsanto*, *Blankenship* should not be read to imply that we would apply the *Cernuto* per-se-illegality standard absent allegations of price fixing or maintenance.

fixing); and *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 685-86 (10th Cir.), *aff'd on rehearing*, 732 F. 2d 779, *cert. denied*, 105 S.Ct. 178 (1984) (tying arrangements).

In rejecting a per se analysis, we believe that a manufacturer generally should have wide latitude in determining the profile of its distributorships. Accordingly, we adhere to the view expressed by the Supreme Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (overruled on other grounds by *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)). In commenting on vertical restraints, the Court stated:

> [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods.

Id. at 376.

The trial court stated that the above-quoted passage in *Schwinn* was inapplicable to this case for two reasons: first, because this case does not involve an exclusive distributorship or franchise; and second, because the evidence showed that "much of Hobart's product line does not have equivalent brands available in the market." *Westman I*, 461 F. Supp. at 637.

Although the trial court correctly observed that *Schwinn* involved an exclusive franchise, we believe that a manufacturer's ability to choose its customers should not depend on whether it has contracted to limit distribution under an exclusive franchise agreement. A manufacturer should be free to restrict distribution whether or not its

decision is made pursuant to an exclusive franchise agreement. Whether or not a franchise agreement exists, the manufacturer will likely be motivated in part by its desire to ensure the loyalty of its distributors. And, ultimately, the manufacturer's decision whether to limit its distributorships will be based on whether the manufacturer believes that limited distribution will make its products more competitive in the market.

Although the evidence showed there was an absence of acceptable substitutes for Hobart products at a comparable price, this fact does not make the broad principle stated in *Schwinn* inapplicable to this case. In effect, the trial court's approach subjected Hobart to especially strict antitrust treatment simply because it produced high quality products and sold them at a price lower than that demanded for competing products of equal quality. Such an approach flies in the face of antitrust policy, because it punishes the manufacturer for making a procompetitive decision to keep its prices low. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, — U.S. —, 106 S.Ct. 1348, 1359, 89 L.Ed.2d 538 (1986). In our view, the fact that a manufacturer sells a high quality product at a price lower than that offered by its competitiors does not, by itself, provide a basis for strictly scrutinizing the manufacturer's distributorship arrangements.

A manufacturer's ability to limit its distributorships may not be restricted because of the absence of equivalent brands unless the manufacturer possesses "market power" with respect to the product whose distributorship arrangements are being questioned. "Market power is the ability to raise prices above those that would be charged in

a competitive market." *NCAA v. Board of Regents of University of Oklahoma*, 104 S.Ct. 2948, 2965 n. 38 (1984).[3]

Ascertaining whether a manufacturer has market power requires the court to employ a market analysis. This court has explained:

> Whether market power exists or can be exercised in the relevant geographic market depends upon the existence of competing products to which a purchaser can turn when faced with relative price increases. Whether product competition exists is determined by two factors:
>
> > "(a) The reasonable interchangeability of use to which two or more products can be put. This factor, in turn, is satisfied when two or more products (i) have essentially similar physical charac-

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[3] We distinguish this definition of "market power" from the definition of "monopoly power" we recently offered in *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies*, 783 F.2d 159, 163-64 (10th Cir. 1986). In *Shoppin' Bag*, we held that "monopoly power" in a Sherman Act, section two, case is "the ability to control prices *and* exclude competition." *Id.* at 164; 15 U.S.C. § 2 (1982). In our view, proof of "market power" required for a court to restrict a manufacturer's ability to freely distribute its goods requires a lesser showing. To demonstrate "market power," a plaintiff may show evidence of *either* "power to control prices" or "the power to exclude competition." *See Board of Regents of University of Oklahoma v. NCAA*, 707 F.2d 1147, 1158 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984). We believe that this lesser showing should be required because a manufacturer may possess the ability to sustain a supracompetitive price for its products, even though the manufacturer itself does not have direct power to exclude competition. Competitors may be stopped from entering that manufacturer's market by entry barriers that are wholly independent of a single manufacturer's ability to exclude. Such entry barriers may include high capital costs or legal barriers, such as patents or copyrights. In the presence of these types of entry barriers, a court may find the existence of "market power," even though it does not find that the manufacturer has the "power to exclude competitors."

> teristics, or (ii) can be put to use for the same purpose.
>
> (b) The cross-elasticity of demand, i.e., the extent to which consumer preference shifts freely between two or more products."

Board of Regents of University of Oklahoma v. NCAA, 707 F.2d 1147, 1158 (10th Cir. 1983) (quoting 2 J. Von Kalinowski, *Antitrust Laws and Trade Regulations*, § 6G.04[1] (1982)), *aff'd*, 104 S.Ct. 2948 (1984).

The trial court did not employ a market power analysis. It merely found that the kitchen equipment supply market is highly competitive, that Hobart goods are of high quality, and that eqiuvalent brands are not readily available at a comparable price. *See Westman I*, 461 F. Supp. at 628, 637. Thus, we conclude that the statement in *Schwinn* regarding a manufacturer's ability to determine its distributorship arrangements applies directly to the case at hand.[4]

V.

Sound economic theory supports the cases that have allowed suppliers wide latitude in selecting their distributors. The Supreme Court has recognized that "manufacturers have an economic interest in maintaining as

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[4] Another reason that the broad language in *Schwinn* arguably should not apply to the instant case is that *Schwinn* involved a manufacturer who acted unilaterally, without pressure from a distributor. Hobart, on the other hand, denied Westman a distributorship after receiving complaints from Nobel. However, we believe a manufacturer should be able to weigh the threat of losing dealer loyalty when making distributorship decisions and therefore do not consider this distinction to be critical. *See infra* part VII.

much intrabrand competition as is consistent with the efficient distribution of their products." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 56 (citations omitted). The only real incentive a manufacturer has to restrict distribution of its product is to make its product more competitive. It gains nothing by reducing competition in the distribution of its product. In fact, it has a stake in encouraging distributors to compete by providing more services in conjunction with the sale of its products. *See* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 23 (1981). As one commentator explains:

> [C]ompetition is a continuing search for survival by firms seeking to find more efficient ways to meet shifting and variegated consumer needs; thus, all vertical arrangements between a single manufacturer and those reselling his products are seen as ways of competing that would not exist if the manufacturer did not believe they would increase his profit by increasing his efficiency, as well as the profit and efficiency of his distributors and/or dealers—and, therefore, in the end, achieve proconsumer goals.

Bock, *An Economist Appraises Vertical Restraints*, 30 Antitrust Bull. 117, 120-21 (1985); *see also* Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 140-53 (1984) (explaining that "restricted dealing is a way to compete"). Thus, a manufacturer faces strong market forces impelling it to set up an efficient system of distribution. In some cases, those forces may lead the manufacturer to refuse to deal with certain potential distributors. But, even though those refusals to deal may limit intrabrand competition, they are likely to benefit consumers by increasing interbrand rivalry. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 54-55.

There are several reasons why it is procompetitive to permit a manufacturer to limit the number of outlets that distribute its products. A few are readily apparent. First, when a manufacturer limits the number of its distributors, it may reduce its distribution costs by allowing each distributor to achieve economies of scale and to spread out fixed costs over a large amount of products. *See id.* at 55. Second, refusals to deal may facilitate the entry of new manufacturers into the market. The prospect of limited intrabrand competition that results from restricted distribution may encourage distributors to make the investment necessary to carry a new manufacturer's product. *See id.* Third, limiting the number of outlets that distribute a product may encourage distributors to provide promotional activities, consumer information, and product service. These activities may in turn lead to increased interbrand competition. When a manufacturer limits the number of retail outlets for its products, it ensures that competing sellers of its product will not get a "free ride," or benefit from the promotions or service provided by other distributors. *See id.;* Bork, *Vertical Restraints: Schwinn Overruled,* 1977 Sup. Ct. Rev. 171, 180-81 (discussing ways that vertical restraints can enhance efficiency). Finally, restricting distribution can reduce transactions costs by permitting a manufacturer to deal only with distributors with whom it believes it can develop an efficient working relationship.

Moreover, in the complicated area of vertical restraints, inexactness in the law can hinder decisions and practices that ultimately enhance market efficiency. As Assistant Attorney General McGrath, head of the Justice

Department's Antitrust Division, has observed, "businesses may be deterred from using procompetitive vertical practices by the prospect of long and costly litigation and uncertain results, to the detriment of the economy." Department of Justice Guidelines—Vertical Distribution Restraints, 5 Trade Reg. Rep. (CCH) ¶ 50,473 at 56,186 (May 15, 1985). If the antitrust laws are applied so as to interfere with a manufacturer's ability to deal freely with its distributors, procompetitive vertical restraints may be deterred. In the end, we are convinced that, when a manufacturer is left free to determine the profile of its distributorships, procompetitive incentives will lead it to make distribution decisions that ultimately benefit consumers.

VI.

The trial court's failure to account for the impact of Hobart's actions on consumer welfare is readily apparent in the court's application of the rule of reason to Hobart's refusal to deal. The trial court's rule-of-reason analysis began with an accurate statement of the relevant inquiry: "The rule of reason requires a complex determination of the *effect of a given business arrangement or agreement on competition* and the possible justifications of any adverse effects." *Westman I*, 461 F. Supp. at 636 (emphasis added). This explanation squares with the still-authoritative discussion of the rule by Justice Brandeis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the

> restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

Though the trial court correctly explained the rule-of-reason analysis, it failed to apply the analysis properly. The court merely discussed Hobart's stated reasons for refusing Westman a distributorship and dismissed them a "pretextual." *Westman I,* 461 F. Supp. at 636. After concluding that Westman was a qualified distributor and that it had been denied a distributorship as a result of a conspiracy, the court returned to the market exclusion analysis it had relied on to find a per se violation. Without discussing the effect of Hobart's refusal to deal on consumers in the restaurant equipment supply market, the trial court concluded its rule-of-reason discussion with the bald assertion that trade had been restrained: "If a trader does not have access to Hobart equipment at the same or approximate price as its competitors then the trader is excluded from the market, trade is restrained and the benefits of competition are impoverished." *Id.* at 637-38.

We find no discussion in the court's opinion of the effects that Hobart's refusal to deal had on competition in the restaurant equipment supply market. *See Chicago Board of Trade,* 246 U.S. at 238. Specifically, the court failed to consider the possibility that Hobart's refusal to deal may have promoted interbrand competition. Even though vertical restraints may diminish intrabrand competition, they may "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies

in the distribution of his products." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 54. A thorough rule-of-reason analysis would likely have led the trial court to conclude that Hobart's refusal to deal did not reduce interbrand competition in the Denver-area restaurant equipment supply market. Given the competitiveness of this market, it is highly unlikely that a manufacturer's refusal to deal would have any meaningful effect on interbrand competition. *See Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981) (where interbrand competition is vigorous, termination of distributor is insufficient to support a Sherman Act violation).

Though Westman may have been able to compete more effectively had it been granted a Hobart distributorship, the record does not support the conclusion that Hobart *products* competed less effectively as a result of Hobart's refusal to grant Westman a distributorship. To the contrary, Hobart's refusal to add another distributorship may have had the salutary effect of increasing distributor loyalty or inducing Hobart distributors to provide more pre- and post-sale services, thus causing Hobart products to compete more effectively in the market. Interbrand competition generated by Hobart's refusal to deal may have in turn increased consumer welfare by increasing interproduct rivalry between restaurant equipment manufacturers.

The trial court's erroneous rule-of-reason analysis, standing alone, would require us to remand for a reevaluation of the impact of Hobart's refusal to deal on interbrand competition. *See Borger v. Yamaha International Corp.*, 625 F.2d 390, 397 (2d Cir. 1980) (reversible

error not to instruct jury to consider the effects of vertical restraint on interbrand competition). But, because we believe that Hobart's refusal to grant Westman a distributorship did not violate section one of the Sherman Act, we find it unnecessary to remand to the district court.

VII.

We have recognized above that a manufacturer may properly decide to limit the number of its distributorships for several reasons, one of which may be to ensure dealer loyalty. Whether a manufacturer's decision to limit its distributorship is made when the manufacturer first enters the market through such devices as exclusive or limited distributorships, or whether its decision is made later by denying additional distributorships pursuant to the request of an existing distributor, the effect is the same—the exclusion of a potential distributor-competitor from the market in that manufacturer's product. Responding to the possibility of the loss of an existing distributor's loyalty is analytically no different from ensuring distributor loyalty in advance by the granting of an exclusive distributorship.

Because we believe that manufacturers should be free to choose and terminate their distributors free of antitrust scrutiny so long as their motivation does not involve illegal pricing or tying arrangements, we hold that section one of the Sherman Act does not proscribe refusals to deal absent a showing of monopoly or market power on the part of the manufacturer. *See Schwinn*, 388 U.S. at 376. The evil to be avoided is the reduction of *interbrand* competition between the manufacturer's distributors, not the

reduction of *intrabrand* competition. The trial court's findings in this case compel the conclusion that, on an interbrand basis, the restaurant equipment supply market in the Denver area is highly competitive. Moreover, nothing in the record demonstrates that Hobart had market power. Thus, Hobart's refusal to grant Westman a distributorship at the insistence of Nobel did not violate section one of the Sherman Act. If Westman has any remedy against Hobart or Nobel, it must resort to state law.

For the foregoing reasons, judgment shall be entered in favor of Hobart, and the trial court's award of attorney's fees is reversed.

83-1678 and 83-1801 - WESTMAN COMMISSION COMPANY v. HOBART INTERNATIONAL, INC.

SETH, Circuit Judge, specially concurring:

I concur specially in the majority opinion in this appeal and arrive at the same result but by a slightly different route.

In my view there is no substantial problem as to the product market. The case was tried on the assumption that the product market was restaurant equipment and restaurant supplies. The testimony was so directed. The trial court so found by its adoption of the one-stop shopping distribution method wherein all needed equipment and supplies were provided.

My definition of a geographic market may be somewhat different from that expressed by the majority in Part II of the opinion. I would disregard the location

of the suppliers and instead examine the proof to determine the trade area—that is, where the products are made available to the buyers with the prices at balance, thus the area where a price increase or supply reduction would cause a prompt influx of the products of others not already in the area.

As to the proof, in my view, the trial itself proceeded on the assumption that "the Denver area" was the geographic market area. Again, the proof was so directed. However, the trial court took the proof one step beyond this "Denver area" geographic market and moved into another and quite different subject. Thus, as the majority points out, the trial court's "one-stop shopping" was not a market conclusion. It was instead a description of a marketing method in the Denver area and that alone. I would thus stop with the "Denver area" as the geographic market. This does not necessarily do violence to the trial court's conclusion as it backs it off to the last real geographic market proof before the extra step was taken—the step beyond. In addition, there was shown to be only one distributor using the one-stop method in the Denver area.

I would thus agree with the majority, but on these somewhat different grounds that the Denver area was the geographic market and restaurant equipment and supplies constituted the products market.

I agree with the majority that the position taken by the plaintiff and the uncontroverted proof demonstrate that there was no market power exercised by the defendant, and to the extent the trial court found that there was, it was clearly erroneous.

I also agree with the majority that there can be no per se violation in these circumstances, that is, in the absence of allegations of illegal pricing (maintenance or increases) or tying arrangements.

I am uncertain as to what really remains of the decision in United States v. Arnold, Schwinn & Co., 388 U.S. 365, and for that reason I am not prepared to rely on segments of it.

Section V and VI of the majority opinion are concerned with economic theory and I am unable to concur in them. Section V begins with an express reliance on what it terms "sound economic theory." I am not sure there is any such thing as a characterization of the new and retreaded economic theories depends so much on where you sit.

For the above reasons I would reverse.